UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SEATON INSURANCE COMPANY, f/k/a UNIGARD MUTUAL INSURANCE COMPANY,

Plaintiff,

v.

ILLINOIS UNION INSURANCE COMPANY, f/k/a GATX INSURANCE COMPANY,

Defendant.

Civil Action No.: 07-332-S

PLAINTIFF SEATON INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE SUPPLEMENTAL DECLARATION OF CLIFFORD B. HENDLER

Plaintiff Seaton Insurance Company, f/k/a Unigard Mutual Insurance Company ("Seaton"), submits this Memorandum of Law in support of its Motion to Strike the Supplemental Declaration of Clifford B. Hendler ("Supplemental Hendler Declaration") submitted in connection with the "Notice of Appeal from Magistrate Judge's Memorandum and Order" filed by Defendant Illinois Union Insurance Company, f/k/a GATX Insurance Company ("Illinois Union"), on July 10, 2008. The Supplemental Hendler Declaration was not part of the record before Magistrate Judge David L. Martin in considering Illinois Union's Motions for Admission *Pro Hac Vice* and the related motion to disqualify filed by Seaton that are the subject of the Order appealed to the Court by Illinois Union. Neither the Magistrate Judge nor the Court requested any supplemental information from Illinois Union. The statements contained in the Supplemental Hendler Declaration are irrelevant to the issues before the Court, and are also misleading and incomplete. Accordingly, this unauthorized attempt by Illinois Union to expand the record is totally inappropriate and the Court should disregard the contents of the Supplemental Hendler Declaration.

INTRODUCTION

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72(a), Illinois Union has filed an appeal from the "Memorandum and Order Addressing *Pro Hac Vice* and Related Motions" issued by United States Magistrate Judge David L. Martin on June 18, 2008. [PACER No. 45]. Illinois Union submitted with its Notice of Appeal [PACER No. 50] certain materials in support of its position, including the Supplemental Hendler Declaration. ["Ex. I" to Notice of Appeal; PACER No. 50-10; "Ex. A" to Seaton's Motion to Strike]. The Supplemental Hendler Declaration was not part of the record before the Magistrate Judge in considering Illinois Union's Motions for Admission *Pro Hac Vice* and the related motions that are the subject of the Order.

Illinois Union appeals from Magistrate Judge Martin's Order denying admission *pro hac vice* to Attorneys Devery and Kalish of the Crowell & Moring law firm because of a conflict of interest arising out of their firm's ***concurrent representation of Seaton***.[1] The Motions for Admission *Pro Hac Vice* and related motions are not dispositive of the action pending before the Court. On appeal, Illinois Union argues that, pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72(a), the Order is clearly erroneous and not in accordance with law. However, 28 U.S.C. §636(b)(1)(A) and Fed.R.Civ.P. 72(a) ***do not*** provide for the consideration of allegedly "new" evidence by the District Court in reviewing an order of a Magistrate Judge that is not dispositive.

[1] Seaton separately addresses the merits of the appeal in its Memorandum of Law in Opposition to Illinois Union's Notice of Appeal, filed herewith.

Illinois Union's prior submissions in connection with the Motions for Admission *Pro Hac Vice* and related motions total more than 150 pages. Illinois Union had ample opportunity to present all facts relating to the motions at issue. None of the information contained in the Supplemental Hendler Declaration came into existence after the hearing on March 6, 2008. Instead, only after the Magistrate Judge heard oral argument and issued a Memorandum and Order denying Illinois Union's Motions for Admission *Pro Hac Vice* did Illinois Union seek to introduce the self-serving Supplemental Hendler Declaration directly to the Court. The Supplemental Hendler Declaration was not before Magistrate Judge Martin. Therefore, the Supplemental Hendler Declaration should be stricken and not considered in reviewing Magistrate Judge Martin's Memorandum and Order.

ARGUMENT

I. THE SUPPLEMENTAL HENDLER DECLARATION SHOULD NOT BE CONSIDERED BY THE COURT.

The Supplemental Hendler Declaration was not part of the record before Magistrate Judge Martin in considering Illinois Union's Motions for Admission *Pro Hac Vice* and related motions. [*See* Notice of Appeal at 2, n.2]. In reviewing a magistrate judge's order, the District Court is not required to receive further evidence. *Jasty v. Wright Medical Tech., Inc.*, 528 F.3d 28, 2008 U.S. App. LEXIS 11980, at *12, Nos. 07-1743, 07-1744 (1st Cir. June 5, 2008). The parties agree that the applicable standard for review of the Magistrate Judge's Memorandum and Order by the Court is "clear error." [*See* Illinois Union Br. at 12; Seaton Br. at 20].[2]

---

[2] Moreover, for all the pontificating contained in Illinois Union's Brief, Illinois Union never mentions the fact that it was originally represented in this case by nationally known reinsurance counsel (the Mound, Cotton firm located in New York City) who ***did not*** have a conflict of interest and whose *pro hac vice* admission was promptly granted by the Court. [Text Order 11/26/07, granting PACER Nos. 7, 8]. The instant dispute only arose when Illinois Union decided, with no explanation, to withdraw Mound, Cotton's appearance in the case and sought to

Although the District Court is vested with the discretion to receive further evidence in reviewing dispositive motions that involve a *de novo* standard of review, no such discretion exists when the Court is reviewing a decision on nondispositive motions and the "clear error" standard of review applies. *Compare* 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ.P. 72(b)(3) (expressly permitting the District Court to receive further evidence in reviewing objections to a magistrate judge's findings and recommendations on a dispositive motion) with 28 U.S.C. §636(b)(1)(A) and Fed.R.Civ.P. 72(a) (no discretion to receive further evidence). The United States Court of Appeals for the Third Circuit has succinctly contrasted the rules that apply to review of a magistrate judge's decision under subparagraphs (A) (for nondispositive motions) and (B) and (C) (for dispositive motions) of 28 U.S.C. § 636(b)(1):

> The clear and unambiguous language of the statute thus provides for different standards of review when the district court "reconsiders" rulings of the magistrate judges in non-dispositive matters under (b)(1)(A) and when it considers "written objections" to "proposed findings and recommendations" of the magistrate judge in dispositive matters under (b)(1)(B) and (C). Under (b)(1)(A), the standard of review is circumscribed: The district court is bound by the clearly erroneous rule in findings of facts; the phrase "contrary to law" indicates plenary review as to matters of law. Under (b)(1)(B) and (C), the district court is permitted to make a de novo determination of proposed findings and recommendations, and "may also receive further evidence."
>
> The distinction is important here, because the district court judge was reviewing a subparagraph (A) non-dispositive matter and not a dispositive matter under subparagraphs (B) and (C). It is a distinction ***with*** a difference. In a subparagraph (A) matter, the district court is not permitted to receive further evidence; it is bound by the clearly erroneous rule in reviewing questions of fact.

Haines v. Liggett Grp., Inc., 975 F.2d 81, 91 (3rd Cir. 1992)(emphasis supplied).

---

substitute non-Rhode Island lawyers who do not have a right to practice in Rhode Island except by leave of Court and who were on notice that Seaton would not consent to the conflicting representation.

In reviewing a magistrate judge's nondispositive order for clear error, a District Court may only properly consider the evidence that was before the magistrate judge at the time of the order. *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02-7345, 2003 U.S. Dist. LEXIS 10567, at *13 (N.D. Ill. June 20, 2003). If new evidence was introduced in the course of reviewing a magistrate judge's nondispositive order, the District Court would essentially be conducting an impermissible *de novo* review. *Continental Bank, N.A. v. Premier Sys., Inc.*, No. 88-7703, 1989 U.S. Dist. LEXIS 6653, at *2 (N.D. Ill. May 31, 1989). The Federal Magistrate Act "does not specifically provide for new evidence to be taken by the district court on motions referred under subsection 636(b)(1)(A)(and this is not the usual course)…. No doubt, in ordinary cases, limited review on the existing record should be the rule after a reference under subparagraph (A)."[3] *Conetta v. Nat'l Hair Care Centers, Inc.*, 236 F.3d 67, 74 (1st Cir. 2001).

The Magistrate Judge's Memorandum and Order relates to nondispositive *pro hac vice* and related motions, and, pursuant to 28 U.S.C. §636(b)(1)(A) and Fed.R.Civ.P. 72(a), is subject to review only for "clear error". Therefore, any evidence that was not before the Magistrate Judge cannot be considered on review. Because the Supplemental Hendler Declaration was not before Magistrate Judge Martin, it cannot be considered in the District Court's review of the Memorandum and Order and should be stricken.

The reasons that generally prohibit the submission of allegedly "new" evidence in connection with a review of a nondispositive motion are clearly applicable here. The Supplemental Hendler Declaration purports to characterize the nature of the relationship between Seaton and Crowell & Moring, as well as the nature of the cases in which Crowell & Moring currently represents Seaton. [Supp. Hendler Decl., ¶¶3-5]. Illinois Union then proceeds to argue that Crowell & Moring has only a "vestigial" relationship with Seaton, such that the fact that it is ***currently counsel for Seaton*** (and was at the time that it sought *pro hac vice* admission) should be disregarded. [Illinois Union Br. at pp. 1, 26]. Crowell & Moring (and its client, Illinois Union) appear to equate the "significance" of a conflict with how many hours the firm bills for a particular client and which client is more important to its economic health. Apart from the fact that the Rhode Island Rules of Professional Conduct contain no such qualification or limitation on an attorney's ethical obligations to a client based upon "billable hours," any consideration of these alleged "facts" would then require Seaton to submit a counter-affidavit to respond to the inaccuracies contained in the Supplemental Hendler Declaration, which would then no doubt be subject to yet another rejoinder by Illinois Union. If such a procedure were to be permitted, every case would devolve into *de novo* review involving the consideration of matters that were never before the magistrate judge. Illinois Union has not offered any reason why the Court should entertain such a prospect here, nor has it bothered to seek leave of Court to consider this additional affidavit—it just filed it as part of the "record" without permission to do so or even a request that the Court grant such permission.

---

[3] Consideration of new evidence may be appropriate where the district court, after receiving the magistrate's determination, finds no clear error or mistake of law on the existing record but has reason to think that the record was incomplete. *Conetta*, 236 F.3d at 74.

Further, on its face, the Supplemental Hendler Declaration is irrelevant, incomplete and misleading. While the declaration purports to provide the Court with Crowell & Moring's view of the current status of certain matters, it fails to advise the Court concerning the complete history of these matters; the history of its relationship with Seaton; and the fact that the Crowell & Moring firm has been paid hundreds of thousands of dollars in fees to represent Seaton's interests in these cases—hardly a "vestigial" relationship. For this reason as well, there is no basis for the Court to re-open the evidence given the highly circumscribed nature of the Court's review of the Magistrate Judge's Order.

For the foregoing reasons, the Court should strike the Supplemental Hendler Declaration. Similarly, the Court should also strike Illinois Union's arguments that rely upon the Supplemental Hendler Declaration because those contentions rely upon facts that were not before the Magistrate Judge and are not properly part of the record.

Respectfully submitted,
SEATON INSURANCE COMPANY, f/k/a
UNIGARD MUTUAL INSURANCE COMPANY
By its attorneys,

/s/ John T. Harding

____

John T. Harding, *pro hac vice*
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210-1181
(617) 439-7500

Thomas M. Robinson, RI Bar # 6193
MORRISON MAHONEY LLP
10 Weybosset Street, Suite 900
Providence, RI 02903-7141
(401) 331-4660

Dated: July 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the Electronic Case Filing (ECF) system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 31, 2008.

/s/ John T. Harding

____

John T. Harding